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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

COMMENTS OF CONTINENTAL CABLEVISION, INC.

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TABLE OF CONTENTS

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I. INTRODUCTION AND SUMMARY

Continental Cablevision, Inc. is the third largest multiple cable system operator, serving approximately 4.2 million customers in some 900 franchise areas across the United States. In our comments we will not attempt to address every issue raised in the Commission's OVS Rulemaking, but will address certain fundamental issues that we believe are critical to insuring that the OVS regime the FCC establishes meets the Congressional goals of promoting facilities-based competition and diversity of programming choices.

OVS must not become a mere subterfuge to allow telephone companies to avoid local franchising obligations as they provide video services. The FCC must remember the lessons of video dialtone. Many telephone company proposals to the FCC attempted to end run the legitimate conditions the FCC set for that service. OVS should not end up with so many loopholes that it becomes the "son of video dialtone".

The two keys to the success of the Commission's rulemaking and its adherence to Congressional intent are that:

1. the FCC must insure that open video systems are operated in a non-discriminatory manner, and

2. the reduced regulatory obligations made available to OVS providers must be provided on a fair, nondiscriminatory basis to all entities that wish to use this regulatory model.

The FCC recognizes in its Notice that Congress signaled its clear intent that programming would be offered by others on open video systems, and would compete with the programming of the OVS operator. It is also fundamental to the fairness and ultimate success of the OVS scheme that cable operators be able to lease OVS channels and themselves become OVS system operators.[1/]

OVS operators will have so great an advantage simply by not being forced to participate in the local franchising process that the FCC should do all in its power to insure that the Title VI regulations Congress has mandated for OVS be strictly enforced. Moreover, since OVS is in effect an expanded version of the cable operator's obligation to provide commercial leased access, the rate-setting process for the two schemes should be in harmony.

Continental also urges the FCC to:

- impose a fair cost allocation scheme, including a separate subsidiary for OVS, as a requirement for certification,

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[1/] Report and Order and Notice of Proposed Rulemaking ("Notice"), CS Docket No. 96-46 (rel. March 11, 1996) at ¶ 4.

- insure nondiscrimination in the allocation and sharing of OVS channels, and

- prohibit joint marketing of OVS and telephone service.

II. CONGRESS DID NOT INTEND THAT OVS ALLOW TELEPHONE COMPANIES TO OPERATE "UNFRANCHISED CABLE SYSTEMS" THAT DO NOT COMPLY STRICTLY WITH THE TITLE VI OBLIGATIONS CONGRESS IDENTIFIED

Congress intended that OVS systems comply with the fundamental principles of Title VI of the Communications Act, as articulated by Congress in the 1984 and 1992 Cable Acts. Congress did not intend for the FCC to reduce these obligations to give OVS operators a further competitive advantage vis-a-vis cable operators than already codified.[2/]

This is particularly important to the continuation of competition in the video marketplace, since even with franchise fees, must carry, syndicated exclusivity, and PEG access imposed on OVS operators, cable operators will still be at a competitive disadvantage. Cable operators will still be captive to the extensive negotiations and hearings required by the local franchising process, as well as to customer service and other obligations of Title VI not specifically imposed by Congress on OVS.

For example, in a recent renewal Request for Proposals ("RFP") for Brockton, Massachusetts, a city with 22,000 subscribers, the demands placed on Continental include the following capital commitments:

[2/] 47 U.S.C. § 653(b)(1)(D), (c)(1) and (c)(2)(A), as amended by § 302 of the Telecommunications Act of 1996 ("1996 Act").

- $975,000 for the local PEG access studio,
- $100,000 for a local college, and
- $150,000 for local schools.

The RFP also requires that Continental's own local origination efforts continue, in addition to the company's PEG access requirement. The RFP calls for an unlimited number of drops and outlets in municipal buildings and schools and an Institutional Network capable of handling Ethernet speed data and connected to any municipal building upon request. The RFP imposes customer service regulations covering sales and solicitation procedures and even the format of the cable bill.

The time demands of the renewal process are extensive. A foot of material is called for to respond to the information requests in an RFP such as Brockton's. Apart from these regulatory costs, substantial reporting requirements impose additional hidden costs on cable operators. Cities often require the right to conduct performance evaluations at will and extensive annual and interim reports.

OVS operators will not have to deal with cities in these interminable and expensive negotiations. They need only comply with the federal checklist to be created by the FCC. For this reason, this checklist must be carefully constructed, and at a minimum require strict compliance with the Title VI requirements specified in the 1996 Act.

The Brockton RFP is by no means unique. In Xenia and Beavercreek, Ohio, Continental recently spent nine months negotiating a proposed 50-page renewal ordinance. This was to be followed by a short acceptance franchise. Instead, without warning, the cities' consultant sent a 40 page franchise agreement containing numerous substantive issues that had never previously been discussed. Total capital requirements under the draft franchise, including a fiber Institutional Network with dedicated fibers to each node in the system, totaled $5.85 per subscriber per month.

With knowledge of this basic significant advantage to OVS, the FCC should strictly follow Congressional intent that those Title VI areas selected by Congress specifically for application to OVS should apply with the full vigor with which they apply to cable systems. With the single exception that it must make available a greater percentage of its channel capacity for independent use than a cable operator must for leased access purposes, an OVS operator looks and acts like a cable operator. At a minimum, therefore, it should have the same obligations as a cable operator, at least in the areas identified by Congress.

For example, the Commission seems ambivalent in the Notice about imposing full must-carry obligations on all segments of an OVS and full PEG access obligations on an OVS operator that covers several different franchise jurisdictions.[3/] But cable system operators are frequently subjected to similar problems.

[3/] Notice at ¶¶ 58, 60.

Continental's individual cable systems also often cover multiple ADIs with conflicting must carry requirements. For instance, in the rural Northwest Ohio market, Continental has successfully developed a standard channel line-up available to 55,000 plus subscribers in over 100 communities, even though the area encompasses 3 ADIs.

Cable systems often cover numerous franchise jurisdictions with different PEG access requirements. For example, Continental's cable system in the western suburbs of Boston serves a number of Massachusetts cities and towns, including Dedham, Newton, Needham, Sherburn, Watertown, Wellesley, Weston, and Natick. Each one of these municipalities imposes its own PEG access requirements, despite the fact that they are contiguous and are served by a single headend.

The FCC suggests that the OVS operator might be able to fulfill its PEG access obligations simply by interconnection with the PEG access channels of the local cable operator. While Continental would like to be able to defray some of its costs in this area, as a matter of public policy we believe that communities would be better served by having more local programming produced. Thus, we would recommend any shared PEG access arrangement only as a last resort where the OVS operator can demonstrate that it is infeasible for it to establish PEG access facilities and provide the necessary staffing and operating support. If interconnection is to be the solution, however, the OVS operator should be required to fully compensate the local cable system for the capital and operating costs incurred by the cable system in creating and maintaining the access infrastructure.

Thus, PEG access and must-carry obligations cannot fairly be weakened for OVS simply because their enforcement creates what the FCC notes appear to be regulatory and practical anomalies. The cable industry has been living with similar anomalies in its regulatory scheme for years, without any FCC relief.

Many of Continental's additional concerns about OVS, discussed below, flow from this fundamental, inherent imbalance in obligations between franchised cable operators and unfranchised OVS operators. If the Commission confers any additional benefits not explicitly mandated by Congress that would allow telephone companies operating OVS systems to gain a further economic advantage over cable, this would undermine the future of the very two-wire competition that OVS was intended by Congress to foster.

III. THE RATE-SETTING PROCESS FOR LEASING OVS CHANNELS SHOULD BE THE SAME AS THE RATE-SETTING PROCESS FOR CABLE OPERATOR LEASED ACCESS CHANNELS

The 1996 Act requires the Commission to prescribe regulations to ensure that rates are "just and reasonable" as well as "not unjustly or unreasonably discriminatory."[4/] The Commission states that OVS operators should be provided with initial "flexibility" to establish pricing mechanisms, and that it would not be appropriate to use "traditional pricing mechanisms in the common carrier and public utility context," since Congress has declared that OVS is "not a common carrier system."[5/]

[4/] 1996 Act § 653(b)(1)(A).

[5/] Notice at ¶¶ 30, 31.

The Commission seeks to make the OVS channel leasing system as operator-initiated and as nonintrusive as possible. Such an approach may be reasonable. But if so, it is equally so for a cable's commercial leased access pricing scheme. OVS is in theory, and most likely in practice, simply a form of expanded "leased access," providing a set-aside of channels for public lease that are similar in form to those made available to independent programming packagers under the leased access regime imposed on cable operators by the 1984 and 1992 Cable Acts. And cable is also stated specifically not to be treated as a common carrier under Title VI of the Communications Act.[6/]

Ironically, however, while the Commission is proposing flexibility for the OVS operator, it is at the same time attempting to impose strict regulations on cable television system operators in the leasing of their channels.[7/] Since these rules are being promulgated concurrently it seems only reasonable that whatever rate-setting scheme the FCC develops for leased access rate-setting by cable operators, the same scheme should apply with equal force to the rate setting process of OVS operators.

An issue raised in both rulemakings is whether rates should be different for users such as nonprofits. Again, the rules should be similar for OVS and cable leased access. However, because Title VI PEG access requirements already provide free access for non-profits, and would apply to both OVS operators and cable operators, it is not necessary that

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[6/] Section 621(c), 47 U.S.C. § 541(c).

[7/] Order on Reconsideration and Further Notice of Proposed Rulemaking (FCC 96-122) (See FCC News Release, March 21, 1996).

non-profits also receive discounts for commercial leased access or OVS channels. Both commercial leased access and OVS are aimed at a functioning commercial marketplace.

Another common issue for both OVS and cable leased access is what to do when channel capacity is fully allocated. The OVS operator initially appears to be favored. If the OVS operator's capacity is fully used, the FCC proposes that it will not have to discontinue immediately channels that it now is carrying in order to add on the programming of a new packager who wants to use a portion of the capacity. The Commission is apparently open to providing a substantial transition period so as not to disrupt viewing habits.[8/] The Commission should follow a similar approach when it considers the issue of adding new leased access channels where a cable operator's capacity is also fully utilized.

IV. CABLE OPERATORS SHOULD NOT BE FORECLOSED FROM BEING OVS OPERATORS OR OVS LESSEES

A. Given The Potentially Overwhelming Competitive Advantages Of OVS, Cable Operators Must Be Able To Elect This Option

Continental will not repeat or expand upon the statutory interpretation arguments others, including NCTA, will put forward on this point to confirm Congressional intent that cable operators be able to operate an OVS. But on policy grounds as well, the severe inequities, described above, between the local cable system franchising process and the federal OVS certification process, as well as the differences in the substantive obligations imposed on cable operators and OVS operators, require that cable operators must be allowed to elect the OVS option.

[8/] Notice at ¶ 25.

Where a cable operator determines that OVS is the best vehicle to compete with a telephone company's OVS, or a telephone company's Title VI cable system, it would totally frustrate Congressional intent that two-wire competition be sustained, not undermined, by OVS, if the FCC were to hold that the cable operator could not make this election.

B. Congress Did Not Intend That Cable Operators Be Precluded From Being Lessees of OVS Capacity

In many markets, cable operators, including Continental, are not able in the short term to compete with DBS in the provision of hundreds of digital pay per view channels. Thus, a capacity shortfall will exist for a substantial period of time before cable systems can be rebuilt to handle digital traffic. During this period cable operators may wish to lease channels from an OVS operator to provide near video on demand through vastly expanded pay-per-view product.

The Commission should not allow OVS operators to restrict cable companies from becoming lessees of their OVS capacity for this or other purposes. There is currently no bar to a telephone company being an OVS operator and providing MMDS service in same market. To prevent a cable system operator from also leasing channels on an OVS would be inconsistent and again unduly favor the telephone company.

V. A FAIR COST ALLOCATION SCHEME MUST BE IN PLACE BEFORE CERTIFICATION AND REQUIRES A SEPARATE SUBSIDIARY FOR OVS

The Commission indicates that it intends to deal with what it recognizes as necessary cost allocation requirements prior to an OVS system's certification. It intends to establish procedures for OVS system cost allocation between regulated and unregulated services under Part 64 of the Commission's rules in a separate rulemaking that the FCC will initiate shortly.[9/]

An OVS applicant should be required to represent that it has filed or will file appropriate amendments to its cost allocation manual. Continental fully supports the position of NCTA on the issue of the appropriate means of applying the Commission's application of Part 64 rules to this area. It endorses the Commission's stated intent to make this process a meaningful one. Any such cost allocations should be done on a system by system basis. Otherwise, competitors and regulators alike will be at a loss as to the allocation of costs with respect to any particular OVS system.

For certification by the Commission as an OVS operator, compliance with a strict checklist that includes the Part 64 cost allocation process must be required before the certification application is submitted. Otherwise, the statutory 10-day review period the Commission will have to act on such certifications will make the process a meaningless one. As noted above, this checklist should contain other necessary certifications of compliance, including all of the Title VI obligations imposed on OVS by Congress.

9/ Notice at ¶ 70 and n.82.

A separate OVS subsidiary should also be a precondition of a checklist for certification. This not only addresses the cost allocation concerns of mingling telephony and video costs but also issues related to joint telemarketing, noted above.

VI. THE FCC SHOULD INSURE NONDISCRIMINATION IN THE ALLOCATION AND SHARING OF OVS CHANNELS

A. The OVS Operator Should Not Be Able To Package Or Control More Channels Than Any Other OVS Lessee

The Commission in its NPRM makes a tentative finding that an OVS operator should be able to market to its subscribers a service package consisting not only of the programming it selects on its one third of system capacity, but also the programming selected by other unaffiliated video programming providers.[10]

Under this scenario, an OVS operator could directly control their own one third of the OVS system's channels and also be able to market it with another two-thirds. If this is allowed, an independent packager that leases one-third of the system must be similarly able to market the OVS operator's services, as well as the services of a second lessee. Otherwise, the OVS operator would be the only entity able to offer an all-channel package while its lessees would be limited to offering packages only a fraction of the size. This will discourage other independent lessees and place them at a severe competitive disadvantage.

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[10] Notice at ¶ 27.

If the bundling and marketing of two or more of the OVS system packages is efficient from an economic standpoint, as the FCC suggests, then it would be as efficient for independent OVS lessees as the OVS system operator.

B. An OVS Operator Should Not Be Able To Retain All Of The Local Advertising Availabilities On Shared Channels

The Commission's Notice encourages the use of shared channels between OVS program packagers.[11/] Continental does not dispute the potential theoretical efficiency of such arrangements. But if shared channels are allowed, they should be administered so as to prevent any discrimination against programmers not affiliated with the OVS operator. If, for example, the OVS operator makes the arrangements with shared cable network channels, it must make available to others these same channels with the ad availabilities shared on a proportional basis.

One of the economic benefits of acquiring rights to carry a cable programming network is the local ad availabilities made available for cable operators from basic networks. Typically, basic programming networks provide cable operators with two or even three minutes of advertising availabilities per hour, typically in the form of 30 second spots. In 1995, Continental's advertising revenues amounted to nearly $67 million or nearly 5% of its total revenues.

[11/] Notice at ¶ 36.

Local advertising is one of the fastest growing areas of the cable business. For instance, since 1990, Continental has seen a 19% compounded annual rate of growth in advertising sales. If the OVS operator monopolizes all of these availabilities, it will gain a substantial advantage over other OVS lessees.

Simply requiring the OVS operator to provide compensation to the other users of these shared channels for lost ad revenues would not be sufficient. If, for example, NYNEX owned the OVS system it might fill ad availabilities with NYNEX image advertisements, or promotions for NYNEX's own OVS service package. The carriage of these shared channels by other lessees would thus competitively disadvantage them despite the financial payment of lost compensation.

C. OVS Operators Should Not Be Able To Occupy All Of The Analog Channel Capacity

The Commission again proposes to allow OVS operators flexibility in allocation where demand for capacity exceeds supply, but recognizes that it must guard against "impermissible discrimination."[12/] Such discrimination is less likely when allocation is based on proportional allotment after an enrollment period.

Proportional allotment, however, should cover both the analog and digital channel capacity. The OVS operator should not be allowed to take all of the analog capacity, even on an interim basis.

[12/] Notice at ¶ 24.

VII. THE COMMISSION SHOULD INSURE THAT OVS OPERATORS CANNOT JOINTLY MARKET VIDEO SERVICES IN COMBINATION WITH LOCAL TELEPHONE SERVICE

Continental strongly urges the Commission to insure that telephone companies receiving the initial call for telephone service from new residents or those changing their address in a community, do not have the advantage, at that initial point of contact, to ask the telephone service customer if he or she wishes to sign up for video service. This concern, along with the cost allocation concerns discussed below, is also an important reason for the FCC to require telephone companies to operate OVS systems through a separate subsidiary, and not to allow any joint marketing by the two enitities.

Congress specifically sought to prevent discrimination in the marketing over the OVS of the OVS operator's programming package.[13] The intermingling of telephone and video functions in the same entity will encourage these and other unfair practices, including unfair practices in both inbound and outbound telemarketing.

If, however, the FCC does allow joint marketing of any type, it should specify that any time the telephone company solicits for telephone service, or is called for telephone service, the offerings of all OVS lessees must be disclosed to the telephone customer on an equal basis. Additionally, new telephone customers should be apprised that video services may be obtained from the local cable operator. In addition, any written materials about the telephone company's own OVS programming package must, at a minimum, include equivalent materials on the offerings of other packagers programming on the OVS system.

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[13] 47 U.S.C. § 653(b)(1)(E), as amended by § 302 of the 1996 Act.

CONCLUSION

OVS, to be consistent with Congressional intent, must serve the ends of fair competition and consumer choice. Without the above safeguards, OVS will no more serve these ends than did the Commission's video dialtone scheme, which, while well intentioned, was subverted in practice.

Respectfully submitted,

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